STATE OF MINNESOTA

IN SUPREME COURT

A19-0829

Court of Appeals

Chutich, J.
Concurring in part, dissenting in part,
Gildea, C.J., McKeig, J.

Max Carl Werlich,

Appellant,

vs.

Filed: April 21, 2021
Office of Appellate Courts

Paul Schnell, et al.,

Respondents.

Thomas Schultz, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, D.C.; and

Bradford Colbert, Legal Assistance to Minnesota Prisoners, Saint Paul, Minnesota, for appellant.

Keith Ellison, Attorney General, Matthew Frank, Assistant Attorney General, Saint Paul, Minnesota, for respondents.

William Ward, Minnesota State Public Defender, Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota, for amici curiae Minnesota Board of Public Defense and Minnesota Association of Criminal Defense Lawyers.

Joshua Esmay, The Legal Rights Center, Minneapolis, Minnesota, for amicus curiae The Legal Rights Center.

S Y L L A B U S

1. *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999), does not foreclose constitutional challenges to the consequences resulting from registration as a predatory offender when the Legislature has expanded the requirements and consequences of that registration beyond those considered in that decision.

2. The district court did not err in dismissing claims that are moot, not ripe, or otherwise not justiciable.

3. The complaint stated a claim upon which relief can be granted, specifically a claim that requiring registration as a predatory offender imposes collateral consequences that burden appellant's fundamental right to parent and, therefore, violated due process.

4. The district court did not err in dismissing a procedural due process claim based on exclusion of registered predatory offenders from eligibility for the Challenge Incarceration Program, under Minnesota Statutes section 244.17, subdivision 3(a)(4) (2020), because appellant does not have a statutory liberty interest in conditional release.

5. The Minnesota Predatory Offender Registration Law, Minnesota Statutes section 243.166 (2020), does not unconstitutionally restrict the discretion of prosecutors under the separation of powers doctrine.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

CHUTICH, Justice.

This case concerns as-applied constitutional challenges to the collateral consequences resulting from registration as a predatory offender, which the district court dismissed under Rule 12.02 of the Minnesota Rules of Civil Procedure. The statute provides that a person must register as a predatory offender if the person is convicted of an enumerated offense or charged with an enumerated offense and convicted of any other offense that arises out of the same set of circumstances as the charged offense. Minn. Stat. § 243.166, subd. 1b (2020). Appellant Max Carl Werlich was initially charged with kidnapping, an enumerated offense, and two other offenses. Under a plea agreement, the State dismissed the initial complaint and filed a new complaint charging Werlich with crimes other than kidnapping.

After Werlich pleaded guilty and began serving his sentence, the Commissioner of Corrections denied his application for the Challenge Incarceration Program because persons required to register as predatory offenders are not eligible for that program. *See* Minn. Stat. § 244.17, subd. 3(a)(4) (2020). Specifically, the Commissioner asserted that Werlich's convictions for crimes other than kidnapping arose out of the same set of circumstances as the initial, but dismissed, charge of kidnapping. Given those shared circumstances, the previous charge of kidnapping required Werlich to register as a predatory offender under section 243.166, which made him ineligible for the Program. Werlich then sued the Commissioner for injunctive and declaratory relief, alleging that the predatory offender registration statute and its many collateral consequences deny him due

process as applied to his charged, but not convicted, enumerated offense of kidnapping. The district court granted the Commissioner's motion to dismiss, and the court of appeals affirmed. We granted Werlich's petition for review concerning the dismissal of his constitutional claims.

We conclude that several of Werlich's claims are not justiciable, but at least some of the facts alleged in the complaint state a claim upon which relief can be granted. Accordingly, we affirm in part and reverse in part the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

FACTS

Because the district court dismissed Werlich's complaint under Rule 12.02 of the Minnesota Rules of Civil Procedure, we accept as true the following facts that he alleged in his complaint. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). Werlich's complaint states that he was at a friend's house when two persons dropped by to sell cannabis. He thought that the two owed him money, he demanded repayment, and a dispute ensued. The two persons told police that they and Werlich went to a gas station where Werlich instructed one of them to withdraw cash from an ATM. Werlich then left with $40 and two cell phones.

Based upon these allegations, the State charged Werlich with one count of kidnapping, two counts of aggravated robbery, and one count of unlawful possession of a firearm. The State and Werlich then negotiated a plea deal that all sides agree was intended to allow him to participate in the Challenge Incarceration Program. The Program is a boot camp-style work program designed to rehabilitate young and able-bodied offenders,

making them eligible for conditional release after six months. As part of the plea agreement, the State dismissed the first complaint and filed a new complaint under a different docket number, this time without the kidnapping charge.[1] Werlich pleaded guilty to the new charges, and the district court sentenced him to 71 months in prison.

After Werlich pleaded guilty and started serving his sentence, the Commissioner of Corrections found Werlich to be ineligible for the Program because he is required to register as a predatory offender. *See* Minn. Stat. § 244.17, subd. 3(a)(4) (excluding from eligibility "offenders who are committed to the commissioner's custody for an offense that requires registration under section 243.166"). A person convicted of an enumerated offense[2] or charged with an enumerated offense and convicted of another offense "arising out of the same set of circumstances" as the charged enumerated offense must register as a predatory offender. Minn. Stat. § 243.166, subd. 1b. According to the Commissioner, Werlich is required to register as a predatory offender because he was initially charged with an enumerated offense—kidnapping—that arose out of the same set of circumstances as the offenses on which he was convicted.

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[1] The new complaint charged Werlich with two counts of fifth-degree drug possession, two counts of threats of violence, two counts of theft, and one count of unlawful possession of a firearm.

[2] Enumerated offenses include murder, kidnapping, criminal sexual conduct, indecent exposure, false imprisonment, and possession of child pornography, among others. Minn. Stat. § 243.166, subd. 1b(a) (2020).

Had Werlich been eligible for and accepted into the Program, he could have been released after six months. *See* Minn. Stat. § 244.172, subds. 1–2 (2020). Instead, Werlich was required to serve his sentence in prison.

Werlich then sued the Commissioner and the Superintendent of the Minnesota Bureau of Criminal Apprehension. Werlich challenged the Commissioner's determination that he is required to register as a predatory offender, his ineligibility for the Program, his transfer to prison, and the imposition of a restriction limiting him to "no-contact" visits with his infant son.

In his complaint, Werlich asserted three claims alleging four constitutional violations. First, Werlich alleged that the Commissioner's reliance on unproven allegations to classify him as a predatory offender violates his substantive due process rights under the United States and Minnesota Constitutions; namely, that the registration requirement infringes on his fundamental rights to an earlier release date, his right to parent his child, his presumption of innocence, and his right to be free from unreasonable searches and seizures. Second, Werlich alleged that predatory offender registration violates his procedural due process rights because the State used unproven allegations as the basis for punishment without affording him sufficient procedure. Third, he alleged that predatory offender registration violates his right to a jury trial and to confront witnesses under the Sixth Amendment of the United States Constitution and Article I, Section 6 of the Minnesota Constitution because the State used unproven allegations as the basis for punishment. Fourth, Werlich alleged that predatory offender registration violates the separation of powers under Article III of the Minnesota Constitution because the statute

imposing that requirement infringes on the prosecutor's discretion not to pursue the original kidnapping charge. He sought injunctive relief under 42 U.S.C. § 1983 and a declaration that he is eligible for the Program, or alternatively, if he is ineligible under the relevant statutes and program rules, that his ineligibility violates his constitutional rights.[3]

The Commissioner moved to dismiss under Rule 12.02(a) and (e) of the Minnesota Rules of Civil Procedure. The district court granted in part the motion to dismiss, finding based on *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999)—and court of appeals' decisions relying on it— that most of the facts alleged in the complaint failed to state claims upon which relief could be granted. The district court did find, however, that Werlich's claim concerning the no-contact visitation restriction with his child survived Rule 12.02(e). The parties then stipulated to dismissal of the no-contact visitation restriction, and the district court directed entry of a final judgment.

The court of appeals affirmed the district court's dismissal of Werlich's complaint. *Werlich v. Schnell*, No. A19-0829, 2020 WL 773493 (Minn. App. Feb. 18, 2020). The court held that the plain language of the statute establishing the Program's eligibility exclusions applied to Werlich. *Id.* at *4–5. Regarding Werlich's constitutional claims, the

[3] In his reply brief, Werlich offered a possible remedy should he prevail. Werlich suggests that we could limit the definition of a predatory offender to only those *convicted* of an enumerated offense. Alternatively, he proposes that we hold each specific challenged statutory consequence to be unconstitutional as applied to a person charged with, but not convicted of, an enumerated offense.

court of appeals agreed with the district court that *Boutin* controlled.[4] *Id.* at *6, *11. The court also held that Werlich's remaining claims were not ripe, in part because of his incarceration. *Id.* at *7. Finally, the court concluded that the predatory offender registration statute does not violate the separation of powers doctrine. *Id.* at *10.

Werlich filed a petition for review. We granted review on the issue of whether the court of appeals erred when it affirmed the dismissal of his constitutional claims.

ANALYSIS

On appeal, Werlich challenges the dismissal of his claims, asserting that the collateral consequences of the predatory offender registration statute violate his due process rights and the separation of powers doctrine. His underlying claims were limited to the consequences of designating him as subject to registration, as applied to his charged, but dismissed, enumerated offense of kidnapping. The Commissioner of Corrections contends that Werlich's claims are not ripe. But even if we address the substance of his claims, the Commissioner asserts that *Boutin v. LaFleur* precludes them. Because the parties dispute whether our decision in *Boutin* controls the outcome here, we address that issue first.

[4] The court of appeals recognized that the current registration statute has changed since *Boutin* was decided and that the statute "requires many more convicted persons to register than were required to register when *Boutin* was decided." *Werlich*, 2020 WL 773493, at *11. It noted, however, that "[t]he larger, policy-based questions . . . are more properly for resolution by the legislative branch or by the Minnesota Supreme Court modifying its precedent." *Id.*

I.

In *Boutin*, we upheld the constitutionality of the predatory offender registration statute. 591 N.W.2d at 716–19. The Commissioner contends that if we reverse the court of appeals in this case, we must necessarily overrule *Boutin*. Werlich counters that *Boutin* does not preclude the relief requested in his complaint because after we decided *Boutin*, the Legislature enacted many additional requirements for and consequences of registration.

Werlich is correct. In *Boutin*, we specifically looked at the impacts of registration as a predatory offender that existed *at that time*. Notably, registration then consisted of only three requirements:

> First, the offender must submit a signed registration form which contains "information required by the bureau of criminal apprehension," along with "a fingerprint card, and photograph of the person taken at the time of the person's release from incarceration or, if the person was not incarcerated, at the time the person initially registered under this section." Minn. Stat. § 243.166, subd. 4(a) (1998). Second, the offender must sign and return an annual address verification form. *See* Minn. Stat. § 243.166, subd. 4(c)(1) (1998). Finally, the offender must notify law enforcement officials in writing at least five days prior to any change in address. *See* Minn. Stat. § 243.166, subd. 3(b) (1998).

Boutin, 591 N.W.2d at 715 (footnote omitted). *See id*. at 717 (explaining that "the primary purpose" of section 243.166 at the time was "to create an offender registry to assist . . . with investigations").

We then analyzed whether the registration statute violated the fundamental right to the presumption of innocence by requiring registration for an enumerated, charged offense even if the person is not convicted of that offense. *See id.* at 716–17. We acknowledged, however, that the presumption of innocence "only applies to statutes which are punitive,

or criminal, in nature." *Id.* at 717. To determine if the registration statute was punitive, we reviewed the *Mendoza-Martinez* factors. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). After examining these factors, we concluded that the statutory registration requirement was not punitive and therefore did not implicate the fundamental right to the presumption of innocence under substantive due process. *Id.* We then held that the registration requirement, while imposing stigma, did not result in a "loss of a recognizable interest" that could give rise to a liberty interest under procedural due process. *Id.* at 718–19 (applying the "stigma-plus" test of *Paul v. Davis*, 424 U.S. 693 (1976), and noting that the requirement to update address information imposed a "minimal burden").

In each part of the *Boutin* analysis, we specifically looked at the statutory registration requirements that existed then, which only consisted of "updat[ing] address information." *Id.* at 718. Since *Boutin*, the Legislature has repeatedly amended section 243.166 and other statutes, expanding the registration requirements and imposing additional consequences of registration. *Compare* Minn. Stat. § 243.166, subd. 4 (1998) (imposing address, photo, and fingerprint requirements for registration), *with* Minn. Stat. § 243.166, subds. 4–4a (2020) (expanded registration requirements). Some of the additional consequences of registration are more substantial than the reputational stigma that *Boutin* discussed.[5] *Id.* at 717.

[5] Registered predatory offenders are, for example, ineligible to serve on school boards, Minn. Stat. § 609B.123 (2020), cannot carry a firearm (even with a permit), Minn. Stat. § 624.714, subd. 24 (2020), and are ineligible to hold a teacher's license, Minn. Stat. § 122A.20, subd. 1(b) (2020).

Accordingly, because the Legislature has provided for registration requirements and statutory consequences markedly different than those in *Boutin*, we are not necessarily bound by *Boutin* to reach the same conclusion here as we did in that case. We use the same analysis, however, as we did in *Boutin*. That is, we consider whether the consequences of registration are punitive or result in a "loss of a recognizable interest," *id.* at 718, that could give rise to a liberty interest under due process. *See Gunderson v. Hvass*, 339 F.3d 639, 643–45 (8th Cir. 2003) (applying the analytical framework of *Boutin* to conclude that providing information concerning residence, employment, and vehicle ownership does not unconstitutionally burden the liberty interests of a person required to register as a predatory offender).

II.

We review de novo a motion to dismiss for failure to state a claim. *Walsh*, 851 N.W.2d at 606. We must "accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Id.* "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Id.* at 603. And "[w]hen the complaint alleges constitutional errors, a Rule 12.02 motion should be even more sparingly granted to ensure that our courts remain open to protect our citizens against possible government overreach." *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

We also review de novo the constitutionality of a statute. *In re Welfare of B.A.H.*, 845 N.W.2d 158, 162 (Minn. 2014). Similarly, we review questions of justiciability,

including ripeness, de novo. *See Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018). Ripeness determines when a claim may be brought. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338 (Minn. 2011). "[A] litigant who questions the constitutionality of a statutory provision, must . . . show that the statute is, or is about to be, applied to his disadvantage." *Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949). Issues that are "purely hypothetical" are not justiciable. *Id.*

Applying these principles here, we first consider whether Werlich's due process challenges to the collateral consequences of predatory offender registration are justiciable. Specifically, Werlich alleges that these consequences unconstitutionally burden several of his fundamental rights: (1) his right to free speech, (2) his freedom from unreasonable searches and seizures, (3) his freedom to travel between states, (4) his right to parent his child, (5) his presumption of innocence and Sixth Amendment rights, and (6) his right to early release under the Challenge Incarceration Program.

We agree with the Commissioner that some of Werlich's claims are not justiciable. First, Werlich does not have standing to assert claims that predatory offender registration restricts his access to social media in violation of his fundamental right to free speech and subjects him to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution. These restrictions apply only to a Level 3 predatory offender, Minn. Stat. § 244.05, subd. 6(a), (c) (2020), and the Department of Corrections has now classified Werlich as a Level 1 predatory offender. Accordingly, Werlich's claims under the First and Fourth Amendments are not justiciable. *See Seiz v. Citizens Pure Ice*

Co., 290 N.W. 802, 804 (Minn. 1940) (stating that to be justiciable, a controversy must "involve[] definite and concrete assertions of right").

Second, we conclude that Werlich's claim that predatory offender registration violates his fundamental right to interstate travel is not justiciable. Werlich asserts that various laws of Wisconsin, Iowa, Michigan, and California impose restrictions and penalties on him because of his status as a predatory offender here in Minnesota, thus significantly restricting his freedom of travel. He has not alleged, however, that any provision of Minnesota's registration statute places any restrictions on his travel. As we noted in *Boutin*, the predatory offender registration statute "does not restrict [an offender's] ability to change residences at will or even to move out of state." *Boutin*, 591 N.W.2d at 717. If the laws of another state restrain his freedom to travel, he ultimately must bring any challenge to those laws in the courts of those states. His argument concerning the alleged restriction on his right to travel asserted here is without merit.

We next consider whether Werlich's claims concerning his fundamental right to parent his child are ripe. He specifically alleges that predatory offender registration "limits [his] ability to raise [his child]," restricts his ability "to live with [his child]," and infringes on his right "to custody of his child." We accept the fact that Werlich is a father to the child as true because he asserted as much in his complaint. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 68 (Minn. 2020). And on a Rule 12.02 motion to dismiss, we draw all

reasonable inferences in favor of Werlich. *See id.* Thus, we may reasonably infer that Werlich will at least live with his child upon his release from prison.[6]

Werlich alleges that three specific collateral consequences of predatory offender registration restrict his ability to parent his child. First, Werlich claims that merely living in the same home with his child is "threatened sexual abuse" that requires investigation. Minn. Stat. § 626.556, subds. 1(b)(3), 2(n) (2018).[7] Second, Werlich claims that the county attorney must file a petition to terminate his parental rights due to his predatory offender registration. Minn. Stat. § 260C.503, subd. 2(a)(6) (2020). Third, Werlich claims that a court need not make "reasonable efforts" to reunite him with his child due to his predatory offender status. Minn. Stat. § 260.012(a)(6) (2020).

The Commissioner responds that Werlich's claims are not ripe because he is incarcerated and the statutes do not prevent him from living with his child or acting as a parent. The Commissioner also asserts that if a petition to terminate parental rights is filed,

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[6] We take judicial notice of Werlich's current status, based on the Department of Corrections' records, which show that he was placed on supervised release on December 21, 2020. To the extent that Werlich alleges that the consequences of registration continue to unconstitutionally burden his right to parent his child, his release has not affected the justiciability of those claims. In addition, his claim premised on his ineligibility for the Challenge Incarceration Program is functionally justiciable because that claim presents an issue of statutory interpretation that has been adequately briefed and argued by the parties. *See In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020). Further, the issue is one of public importance and statewide significance, *see id.*, because it concerns the eligibility of numerous Minnesota inmates for the program.

[7] In 2020, the Legislature recodified section 626.556, subdivisions 1(b)(3) and 2(n), in sections 260E.01(b)(3) and 260E.03, subdivision 20, respectively. For ease of reference given the briefing and prior history of this case, we will continue to refer to the 2018 statute, which is substantively identical to the 2020 recodifications.

Werlich would still be afforded the full procedural protections provided in those proceedings.

Given his release date and his express intent to live with his child after release, we conclude that Werlich's claims are ripe on at least one ground. We first note that a statute need not completely prohibit a parent from seeing or living with their child to impact the fundamental right to parent that child. *See SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) ("A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right."). Werlich is correct that as a registered predatory offender, simply living with his child is "threatened sexual abuse" under the statute, which requires investigation. Minn. Stat. § 626.556, subds. 1(b)(1), (3), 2(n). We conclude that he has a justiciable claim concerning his right to parent his child.

The dissent would hold otherwise for two reasons: (1) that Werlich did not properly allege a right to parent claim in his complaint; and (2) that Werlich has no standing to assert a right to parent claim because he admittedly has no custodial rights to his child at present. On the first point, his request for relief expressly asks the court to "permanently enjoin[] Defendants from enforcing the above-described unconstitutional policies and practices." And under Count I in his complaint, Werlich specifically alleges a violation of his substantive due process rights, citing paragraph 80 of his complaint in which he alleges that his status as a registered predatory offender violates "a parent's right to raise his child."

Indeed, Werlich alleged a violation of his right to parent no fewer than a dozen times in his complaint. *See* Compl. ¶¶ 5–6, 8, 11, 56, 80, 90–91, 106, 124–25, 128 ("[Registration] interferes with Plaintiff's ability to raise and live with his young son."

"[Registration] violates Plaintiff's substantive due process rights . . . [including] to raise his child." "[Registration] limits Plaintiff's ability to parent his child."). And in all three Counts, the complaint incorporates by reference all preceding allegations. *Id.* at ¶¶ 126, 132, 141. Under our liberal pleading standards, Werlich adequately stated a claim that his status as a registered predatory offender violates his right to parent under substantive due process. *See Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 535 (Minn. 2003) ("[C]ourts are to construe pleadings liberally.").

The dissent, citing our decision in *Heidbreder v. Carton*, also concludes that Werlich has no standing to assert a right to parent claim. 645 N.W.2d 355, 372–73 (Minn. 2002) (rejecting a right to parent claim where the putative father did not have a " 'significant custodial, personal or financial relationship' " with his child (quoting *Lehr v. Robertson*, 463 U.S. 248, 262 (1983))). We disagree. Unlike the plaintiff in *Heidbreder*, where there was "no evidence in the record" that the putative father had a personal relationship with his child, *id.* at 372, Werlich here alleges multiple facts that show that he did. Specifically, Werlich alleged in his complaint that he "witnessed the birth of his son" and had "spent that past month [before his sentencing hearing] with his baby boy establishing a good connection with him, and his primary objective in life is to . . . get back home so he can be a father and be a husband and move forward with a whole new chapter in his life." Compl. ¶ 34. Werlich has therefore alleged that he has "a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child" so that "his interest in personal contact with his child acquires substantial protection

under the due process clause." *Lehr*, 463 U.S. at 261 (citation omitted) (internal quotation marks omitted).

Although we conclude that Werlich has sufficiently stated a claim that the consequences of registration, as imposed by section 626.556, violate his right to parent, he misreads the two remaining statutes. While the county attorney is obligated to file a petition to terminate parental rights, she only need do so if the child is in the care of a noncustodial parent. *See* Minn. Stat. § 260C.503, subd. 1(a) (2020). Werlich alleged in his complaint that his child is currently living with the child's mother, who by law is the sole custodial parent until separate proceedings occur. *See* Minn. Stat. § 257.541, subd. 1 (2020). Similarly, Werlich would not be subject to a standard that excuses reasonable efforts for reunification unless a "child alleged to be in need of protection or services is under the court's jurisdiction." Minn. Stat. § 260.012(a). Werlich's complaint states that his child is currently living with a custodial parent so neither of these statutes apply to him presently. Werlich's claims on these grounds are therefore "hypothetical" and not ripe for review. *Delmont*, 36 N.W.2d at 537.

Finally, we consider the justiciability of Werlich's remaining claims—his claim to a presumption of innocence, his claims to a trial by jury and to confront witnesses under the Sixth Amendment, and his claim concerning eligibility for the Challenge Incarceration Program. The first two claims are recognized fundamental rights that are justiciable only if the challenged statute is punitive or criminal in nature. *Boutin*, 591 N.W.2d at 717. Accordingly, we consider these claims in the discussion below. As to the claim concerning

his eligibility to enter the Challenge Incarceration Program, the Commissioner has not asserted that this claim is not ripe. Thus, we also address this claim below.

In sum, Werlich's claims asserting violations of the right to free speech, the right to be free from unreasonable searches, and the right to interstate travel are not justiciable. Accordingly, the district court did not err in dismissing these claims. We next examine the justiciable claims relating to his presumption of innocence, his Sixth Amendment claims, his eligibility to enter the Challenge Incarceration Program, and his right to parent his child.

III.

Werlich asserts that the post-*Boutin* consequences of registration as a predatory offender who was charged with, but not convicted of, an enumerated offense violate his substantive due process rights. The Due Process Clauses of the United States and Minnesota Constitutions provide that the government cannot deprive a person of "life, liberty, or property without due process of law." U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. A statute that affects a fundamental right is subject to strict scrutiny. *SooHoo*, 731 N.W.2d at 821. For those statutes, "the state must show a legitimate and compelling interest for abridging that right." *Boutin*, 591 N.W.2d at 716. If a fundamental right is not affected, the plaintiff must show that the statute does not "provide a reasonable means to a permissible objective." *Id.*

A.

Werlich maintains that registration as a predatory offender violates his fundamental right to a presumption of innocence and his Sixth Amendment rights to both a trial by jury and to confront witnesses because the state mandates registration not only for a *conviction*

of an enumerated offense but also merely for such a *charge*.[8] The fundamental right to a presumption of innocence only applies, however, to statutes which are "punitive, or criminal, in nature." *Boutin*, 591 N.W.2d at 717. The same is true for Werlich's Sixth Amendment rights. *See United States v. O'Laughlin*, 934 F.3d 840, 841 (8th Cir. 2019) (holding that civil commitment is not punitive and therefore does not trigger rights under the Sixth Amendment). The outcome of Werlich's Sixth Amendment claims therefore rises and falls with his substantive due process claims to a presumption of innocence, namely, whether the challenged statute is punitive.

Whether a statute is punitive or regulatory is a question of legislative intent. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). If the Legislature's intent is to establish a regulatory, nonpunitive scheme, then we consider the *Mendoza-Martinez* factors to determine the "purpose or effect" of that statute. *Id.* at 92, 97 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). These factors are whether: (1) the sanction involves an affirmative disability or restraint, (2) the sanction has historically been regarded as a punishment, (3) the sanction comes into play only on a finding of scienter, (4) the sanction's operation will promote the traditional aims of punishment—retribution and deterrence, (5) the behavior to which the sanction applies is already a crime, (6) there exists a rational alternative purpose to the sanction, and (7) the sanction appears excessive in relation to the

[8] Werlich asserts that Minnesota is the only state in the nation with an offender registration law that requires registration as a predatory offender if an offender is "merely '*charged* with' a predatory offense and then convicted of *any* other offense—no matter how minor—that arises from the same set of circumstances as the predatory offense charge."

alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168–69. These factors are "neither exhaustive nor dispositive; rather, they serve as useful guideposts to determine whether a statute creates a civil or criminal sanction." *Rew v. Bergstrom*, 845 N.W.2d 764, 792 (Minn. 2014).

Werlich specifically argues that his ineligibility for the Challenge Incarceration Program and that being subject to mandatory investigation for threatened sexual abuse merely for living with his child—two post-*Boutin* consequences of the predatory offender registration requirement—are each punitive. We address them in turn.

1.

Werlich asserts that excluding him from eligibility for the Program based upon an enumerated offense for which he was not convicted is punitive because the Program offers a form of conditional release. He maintains that "revocation of supervised release is a paradigmatic form of punishment." *See United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring) (noting that "[r]evocation of supervised release is typically understood as part of the penalty for the initial offense" (citation omitted) (internal quotation marks omitted)); *see also United States v. Bennett*, 561 F.3d 799, 802 (8th Cir. 2009). Werlich argues that there is no need to apply the *Mendoza-Martinez* factors to conclude that the "transformation of an anticipated six-month stay in boot camp into a four-year prison term is punitive." According to him, application of the factors merely reinforces this conclusion.

The cases cited by Werlich are inapposite as they specifically dealt with offenders whose supervised release was revoked because of a violation of the terms of the release.

See Haymond, ___ U.S. at ___, 139 S. Ct. at 2380 (explaining that because supervised release arises from the initial offense, "whether that release is *later revoked or sustained*, it constitutes a part of the final sentence for his crime." (emphasis added)). Indeed, "parole *release* and parole *revocation* are quite different." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 9 (1979) (noting the "crucial distinction" between the "liberty one has, as in parole, and being denied a conditional liberty that one desires"). Here, the issue is whether Werlich is eligible to participate in the Program, which provides an opportunity for conditional release.

Conditional release is generally available to any person in the custody of the Commissioner. Minn. Stat. § 243.05, subd. 1(a) (2020). The Legislature has, however, substantially limited conditional release for certain crimes, such as first-degree murder. *Id*., subd. 1(a)(2). Moreover, the United States Supreme Court has held that no constitutional right to conditional release exists. *Greenholtz*, 442 U.S. at 7. Conditional release involves numerous considerations including whether release "will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice." *Id.* at 8.

Application of the *Mendoza-Martinez* factors demonstrates that the Legislature did not intend for the Program eligibility exclusion to be punitive. Some factors do admittedly suggest that the Program's eligibility exclusion for those predatory offenders charged with, but not convicted of, an enumerated offense could be considered punitive. For example, excluding an offender from obtaining conditional release does appear to be historically regarded as punishment. *See* Minn. Stat. § 243.05, subd. 1(a)(2) (excluding first-degree

murder offenders from eligibility for conditional release). In addition, restricting eligibility for conditional release is relevant to deterrence, one of the traditional aims of punishment; the Supreme Court has recognized that awarding conditional release may weaken the deterrent impact on others. *Greenholtz*, 442 U.S. at 8. These factors weigh in favor of finding the Program eligibility exclusion punitive.

The fifth *Mendoza-Martinez* factor—whether the restriction applies to behaviors that are already crimes—does not favor either conclusion. *Mendoza-Martinez*, 372 U.S. at 168. The Program eligibility exclusion is not predicated on a present or repeated violation. Instead, it is predicated on past conduct, which was, and is, a crime. As we made clear in *Rew*, 845 N.W.2d at 793, such past conduct does not favor a conclusion that a sanction is a criminal penalty or a civil remedy.

On the other hand, the Program's eligibility exclusion does not require a finding of scienter in all cases. For example, an offender who has fewer than 180 days remaining until a supervised release date or has an enumerated medical condition is not eligible for the Program. Minn. Stat. § 244.17, subd. 3(a)(6), (10) (2020). Neither of these conditions require scienter. Like the extended order for protection in *Rew*, 845 N.W.2d at 793, which could come into play with or without a criminal conviction, the Program eligibility exclusion can come into play with or without a criminal conviction. Thus, the third *Mendoza–Martinez* factor favors the conclusion that the Program exclusion is a civil remedy.

The Program exclusion also does not involve a significant affirmative restraint, an important factor in this analysis. *See Smith*, 538 U.S. at 100 ("If the disability or restraint

is minor and indirect, its effects are unlikely to be punitive."). Instead, the exclusion merely subjects Werlich to the full term of his sentence. *See Greenholtz*, 442 U.S. at 7; *see also* Minn. Stat. § 244.171, subd. 4 (2020) (stating that an offender who is removed from the Program for a violation cannot be held past the term of imprisonment).

In addition, a clear alternative purpose for the exclusion exists, namely to prioritize those offenders whom the Legislature believes would be most likely to respond well to the Program and to comply with early release. *See* Minn. Stat. § 244.171, subd. 1 (2020) (stating that the goals of the Program include "protect[ing] the safety of the public" and "prepar[ing] the offender for successful reintegration into society").

Nor does the exclusion appear to be excessive in relation to that alternative purpose. As with all government programs, the Program has limited resources to achieve its goal of rehabilitation, and categorical exclusion of certain persons to further that goal is not inherently unreasonable. *See, e.g.*, Minn. Stat. § 244.17, subd. 2(a)(2) (2020) (only allowing offenders with less than 48 months in their sentence to be eligible for the Program). These two factors also weigh against finding the eligibility exclusion punitive.

We give considerable weight to the final two factors, the alternative purpose and excessiveness in relation to that purpose. *See Schall v. Martin*, 467 U.S. 253, 269 (1984) ("Absent a showing of an express intent to punish on the part of the State, [whether a statute is punitive] generally will turn on" the final two factors). It is ultimately not our place to substitute the Legislature's choice of priorities with our own. *See Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993). We therefore conclude that, on balance, the Program eligibility exclusion based on predatory offender registration status is not punitive and the

district court correctly dismissed Werlich's Sixth Amendment and presumption of innocence claim on this basis.

2.

Werlich next argues that the collateral consequences that result from predatory offender registration, specifically the investigation of threatened sexual abuse mandated by section 626.556, subdivision 1(b)(3), are also punitive.[9] We disagree. Applying the *Mendoza-Martinez* factors to this particular consequence shows that it is not punitive.

Only one factor suggests that the consequence is punitive. Mandatory investigation is required for some behaviors that are already crimes. For example, if a person is convicted of an enumerated offense and thereby required to register under the predatory offender statute, that person is also subject to the investigation mandated for alleged sexual abuse or child endangerment. Minn. Stat. § 626.556, subd. 1(b)(3).

All of the other *Mendoza-Martinez* factors weigh in favor of concluding that the collateral consequences represented by the investigations directed by section 626.556, subdivision (1)(b)(3) are civil, regulatory measures to which the presumption of innocence and Sixth Amendment rights do not attach. For example, the investigation itself is not an affirmative disability or restraint. Werlich is subject to investigation, but his registration status alone does not bar him from living with his child. And even if an investigation concluded that Werlich should not be permitted to live with his child, the State would still

[9] The investigation is mandated because threatened sexual abuse includes "the status of a parent . . . who has committed a violation which requires registration as an offender under section 243.166, subdivision 1b, paragraph (a) or (b)." Minn. Stat. § 626.556, subd. 2(n).

need to initiate the appropriate proceedings in court, in which Werlich would receive procedural protections.

Next, conducting an investigation does not appear to have been historically regarded as punishment. Conviction of an offense alone does not, for example, require summary termination of parental rights. *See* Minn. Stat. § 260C.301 (2020) (listing the grounds for termination of parental rights). In addition, allegations of neglect can support an investigation into the maltreatment of a child, Minn. Stat. § 626.556, subds. 1(g) (defining neglect), 3(b) (allowing any person to report suspected neglect), but a finding of scienter is not required for that investigation. Nor are the traditional aims of punishment met when the circumstances require an investigation. The purpose of any investigation is "to prevent or provide a remedy for child maltreatment." Minn. Stat. § 626.556, subd. 10(b) (2018); *see also id.*, subd. 1(a) (stating the policy is to "protect children" and address "immediate concerns for child safety"). These objectives focus on the child, not on deterring the predatory offender from committing misconduct or exacting retribution against the offender.

Further, a clear alternative purpose exists for mandating investigations in the case of a registered predatory offender. When a person is convicted of an enumerated offense, which typically involves injury to another person, or for an offense for which probable cause supports an enumerated charge, at least some evidence exists that the person committed an offense that would generally risk the welfare of a child. Indeed, many of the enumerated offenses under the registration statute are crimes involving sexual misconduct or crimes against children. *See* Minn. Stat. § 243.166, subd. 1b(a)(1)(iii)–(iv); *see also*

Stanley v. Illinois, 405 U.S. 645, 652 (1972) (noting that "the moral, emotional, mental, and physical welfare" of children are "legitimate interests" of the state).

Finally, an investigation is not excessive in relation to the alternative purpose of protecting children. As noted above, even if an investigation has begun, the agency must still make a determination of maltreatment, and if judicial proceedings are initiated, the full procedural protections provided in those proceedings will apply.

In sum, we conclude that the investigation mandated by section 626.556, subdivision 1(b)(3), for a registered predatory offender such as Werlich, who is living with (or intends to live with) his child, is "a civil, regulatory" measure to which "the presumption of innocence does not attach." *Boutin*, 591 N.W.2d at 717. Accordingly, this claim is not subject to strict scrutiny. *Id*.

3.

Having found that strict scrutiny is inapplicable to the above claims, we must decide whether these particular post-registration collateral consequences—the Program eligibility exclusion and mandated investigation for threatened sexual abuse—satisfy rational basis review. *See In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 832–33 (Minn. 2011) (concluding on a motion to dismiss that compensation statutes satisfied rational basis review). The same reasons that support our conclusion that section 626.556, subdivision 1(b)(3), and the eligibility exclusion are not punitive, support the conclusion that these regulatory measures are "rationally related to a legitimate government interest." *Id.* at 830. Specifically, exclusion from the Challenge Incarceration Program is rationally related to the State's interest in preserving program resources for those most likely to respond well

to the rehabilitative nature of the boot-camp approach. Similarly, the State has a legitimate interest in the welfare of children, *see State v. Holloway*, 916 N.W.2d 338, 346 (Minn. 2018), and scrutinizing those who are charged with or convicted of crimes—predominantly those of violence or sexual offenses against children—is rationally related to that end, *see Boutin*, 591 N.W.2d at 718.

For these reasons, Werlich's due process claim, to the extent based on the presumption of innocence and Sixth Amendment trial rights, fails as a matter of law because the statutory provisions he challenges—Minn. Stat. § 244.17, subd. 3(a)(4), Minn. Stat. § 626.556, subd. 1(b)(3)—are not punitive. We further hold that these challenged provisions meet rational basis review. We therefore affirm the district court's dismissal of this claim.

B.

Werlich next makes a separate claim, namely that the investigation mandated by subdivision 1(b)(3) of section 626.556 violates substantive due process because it affects his fundamental right to parent his child. "A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right." *SooHoo*, 731 N.W.2d at 820. For example, in *SooHoo*, we declared unconstitutional one subdivision of a statute that "impermissibly plac[ed] the burden on the custodial parent to prove that [third-party] visitation would interfere with the parent-child relationship." *Id.* at 824. But we also upheld a different subdivision in the same statute that limited "third-party visitation to those who have a longstanding parent-child relationship with the child and prohibit[ed] the district court from granting" that visitation if not in the child's

interests and allowing it would "interfere[] with the custodial parent's relationship." *Id.* We did so because the statute was narrowly tailored to achieve the "state's compelling interest in protecting the general welfare of children by preserving the relationships of recognized family units." *Id.*

Section 626.556, subdivision 1(b)(3), affects Werlich's alleged fundamental right to parent to the same extent that the third-party visitation statute affected the right to parent in *SooHoo*. There, the third-party visitation statute only permitted a person *to petition* for a visitation order; it did not *guarantee* that the visitation would be allowed. Similarly, subdivision 1(b)(3) obligates the agency to investigate because the definition of "threatened sexual abuse" in subdivision 2(n) encompasses Werlich. But the required investigation does not *guarantee* that Werlich will be forbidden from living with his child.

On the other hand, the statute in *SooHoo* did affect a fundamental right to parent based on an improper allocation of the burden of proof, *see* 731 N.W.2d at 824. Werlich's claim that the investigation mandated by section 626.556, subdivision 1(b)(3), affects his fundamental right to parent his child implicates the presumption that he is a fit parent, *see In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136 (Minn. 2014), who is presumed to act in the child's best interests. *SooHoo*, 731 N.W.2d at 824. Given our deferential standard of review, *see Elzie*, 298 N.W.2d at 32, this claim survives the Commissioner's motion to dismiss. Further, this claim is subject to strict scrutiny. Because Werlich has sufficiently alleged facts that, if proven, establish that the investigation mandated as a result of his registration status affects a fundamental right, on remand the Commissioner bears

the burden to show that this statute advances a compelling government interest and is narrowly tailored to serve that interest. *See SooHoo*, 731 N.W.2d at 821–22.

IV.

Werlich next asserts that the consequences of registration based on his charged, but not convicted, enumerated offense violate *procedural* due process. Procedural due process involves two questions. First, is there "a liberty or property interest with which the state has interfered[?]" *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). Second, were the procedures used constitutionally sufficient? *Id.*

A liberty interest includes, but is not limited to, fundamental rights. *See Carrillo*, 701 N.W.2d at 768–69. State law can also "create liberty interests that are protected by due process." *Id.* at 769. Although a particular statutory right may not be protected under substantive due process, the statutory right nevertheless requires procedural due process. *See id.* A person may also have a liberty interest under the "stigma-plus" doctrine. *See Paul v. Davis*, 424 U.S. 693, 701–02 (1976). Under this doctrine, "a liberty interest is implicated when a loss of reputation is coupled with the loss of some other tangible interest." *Boutin*, 591 N.W.2d at 718.

We have concluded above that Werlich has alleged sufficient facts that, if proven, may support a substantive due process violation based on his fundamental right to parent. Accordingly, his complaint also states sufficient facts that, if proven, may support a procedural due process claim based on a protectable liberty interest. *See Santosky v. Kramer*, 455 U.S. 745, 754–55 (analyzing a fundamental right to parent liberty interest under procedural due process).

Werlich also alleges a protectable liberty interest in the opportunity for conditional release under the Program. He maintains that his eligibility exclusion from the Program violates procedural due process because a statutory right to conditional release exists. He is correct that when release is mandated by statute, a liberty interest is created. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 378 n.10 (1987). In *Carrillo*, we held that the supervised release statute, Minn. Stat. § 244.101, subd. 1 (2020), gives rise to a liberty interest in a release date from prison. *Carrillo*, 701 N.W.2d at 771–73. Supervised release under Minnesota law includes "a presumption from the moment that a court imposes and explains the sentence that the inmate will be released from prison on a certain date" unless the inmate commits a disciplinary offense. *Id.* at 772. The inmate consequently has a "concrete expectation of release," *id.* at 772, n.6, which gives rise to a liberty interest, *id.* at 773.

Werlich argues that *Carrillo* grants a liberty interest in conditional release too, including under the Program. And, Werlich contends, although the Commissioner has discretion on who to admit into the Program, he does not have the discretion to determine who is eligible for the Program. The Commissioner counters that the discretion afforded to him concerning admission into the Program means that no particular person has a right to participate in the Program. According to the Commissioner, the Legislature acted within its authority when it set eligibility criteria that excluded registered predatory offenders like Werlich from the Challenge Incarceration Program.

We agree with the Commissioner. Unlike supervised release under Minnesota Statutes section 244.101, which was at issue in *Carrillo*, the Challenge Incarceration

Program is not a "mandatory" program available to all convicted persons. *Carrillo*, 791 N.W.2d at 778. An inmate is not "entitled" to participate in it, nor is the Commissioner "obligated" to accept a particular person into it. *Id.* The Legislature chose to restrict eligibility for the Program based on a number of criteria, including by making registered predatory offenders ineligible. *See generally* Minn. Stat. § 244.17. Although the statute provides that the Commissioner "shall strive" to get the program to capacity, Minn. Stat. § 244.17, subd. 1(b), this language seems more like a policy directive than the sort of mandatory language we found decisive, for liberty interest purposes, in the supervised release statute. *See Carrillo*, 701 N.W.2d at 773; *id*. at 778 (Page, J., concurring). We conclude that Werlich failed to state a claim that he has a liberty interest in the opportunity for conditional release provided by Program that is subject to procedural due process. Accordingly, we affirm the district court's dismissal of this procedural due process claim.

In sum, the district court's determination that Werlich had no protectable liberty interests sufficient to invoke a claim of procedural due process was erroneous as to his liberty interest in his right to parent. We leave it to the parties, upon remand, to litigate whether the procedural process afforded to Werlich concerning his right to parent is sufficient under the *Mathews* balancing test. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Rew*, 845 N.W.2d at 786 (applying *Mathews*).

V.

Finally, Werlich argues that the predatory offender registration statute violates the separation of powers doctrine because it interferes with a prosecutor's decision "whether to bring, and how to prosecute, criminal charges." *In re Death of VanSlooten*, 424 N.W.2d

576, 578–79 (Minn. App. 1988), *rev. denied* (Minn. July 28, 1988). Werlich insists that the statute deters prosecutors from bringing enumerated charges because doing so ties their hands for future plea bargaining. The Commissioner responds that the Legislature properly decided that persons who have been convicted of crimes arising out of the same set of circumstances as an enumerated charge must register as predatory offenders. This collateral consequence, according to the Commissioner, is outside the purview of the prosecutor.

Under the separation of powers doctrine, a prosecutor has broad discretion in the decision to bring criminal charges. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). Although "the imposition of the sentence within the limits prescribed by the legislature is purely a judicial function," *State v. Olson*, 325 N.W.2d 13, 18 (Minn. 1982), the "power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct is vested in the legislature." *Id.* at 17–18.

We agree with the Commissioner; the Legislature has not impermissibly constrained a prosecutor's discretion in the predatory offender registration statute. A prosecutor has discretion not to bring an enumerated charge in the first place, or instead to bring it later in an amended complaint. *See, e.g.*, *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990) (noting prosecutor's discretion to amend a criminal complaint). The prosecutor here was also free to avoid the registration requirement by not charging the offenses that arose out of the same set of circumstances. In the same vein, a prosecutor who agrees to a plea deal that involves

a charge with a mandatory minimum[10] has no control over the consequence of that conviction. *See State v. Jonason*, 292 N.W.2d 730, 734 (Minn. 1980) (upholding mandatory minimum sentences). Similarly, if a prosecutor agrees to a plea deal that involves a charge that arises out of the same set of circumstances as a charged, but dismissed, enumerated offense, she has no control over the consequences of registration.[11] We therefore hold that the predatory offender registration statute does not violate the separation of powers doctrine, and the district court did not err in dismissing this claim.

VI.

To provide clear direction to the district court and the parties on remand, we summarize our disposition here. We hold that our decision in *Boutin* does not foreclose all constitutional challenges to the expanded statutory consequences of predatory offender registration as applied to a person charged with, but not convicted of, an enumerated offense.

We affirm the district court's dismissal of Werlich's claims that assert a substantive due process violation in predatory offender registration based on the potential impacts on

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[10] The prosecutor may move before the sentencing court to ignore the mandatory minimum, but only if "substantial mitigating factors exist." *See Olson*, 325 N.W.2d at 14 (quoting Minn. Stat. § 609.11, subd. 8 (Supp. 1981)).

[11] We also note that a judge reviews charges to ensure they are supported by probable cause. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (explaining that a probable cause hearing protects the defendant from being compelled to stand trial on unjust or improper charges). Moreover, a court can "exercise its own discretion" when reviewing plea agreements if it concludes that conviction on one offense, when a charged enumerated offense on which there is no conviction will result in registration (and its collateral consequences), is unjust. *Johnson v. State*, 641 N.W.2d 912, 917–18 (Minn. 2002) (courts may reject plea agreements that result in injustice).

his parental rights, under Minnesota Statutes section 260C.503, subdivision 2(a)(6) (regarding immediate filing of a termination of parental rights petition), and section 260.012(a) (relieving a court of an obligation to make "reasonable efforts" to reunite a parent and child). We also affirm the district court's dismissal of his claims asserting due process violations based on a fundamental right to a presumption of innocence; his Sixth Amendment rights; his right to interstate travel; his right to free speech; and his right to be free from unreasonable searches. We further affirm the district court's dismissal of Werlich's claim based on an alleged separation of powers violation.

We reverse, however, the district court's dismissal of Werlich's claim of substantive and procedural due process violations based on his alleged fundamental right to parent his child. We conclude that Werlich has sufficiently pleaded that his fundamental right to parent is affected by the investigation mandated by Minnesota Statutes section 626.556, subdivision 1(b)(3), based on his status as a registered predatory offender. *See id.*, subd. 2(n). If, on remand, he succeeds in proving the facts that he has alleged, the burden of strict scrutiny requires the State to show that this mandated investigation advances a compelling government interest and is narrowly tailored to serve that interest, as applied to Werlich. Concerning Werlich's remaining procedural due process claim based on his liberty interest in his right to parent, upon remand, Werlich has the burden of showing that the process afforded to him was constitutionally insufficient.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

C O N C U R R E N C E / D I S S E N T

GILDEA, Chief Justice (concurring in part, dissenting in part).

The majority dismisses all of Werlich's claims except a claim based on a right to parent his biological child. While I do not agree with much of the majority's analysis, I do agree with the majority's conclusion to the extent it affirms the dismissal of the claims the district court dismissed. But because I disagree with the majority's conclusion that Werlich's right to parent claim survives even under a liberal pleading standard, I respectfully dissent.

Werlich filed a complaint asserting only three claims. In Count I, Werlich sought injunctive relief under 42 U.S.C. § 1983, from his classification as a predatory offender, which he alleged excluded him from participating in the Challenge Incarceration Program ("Program"), placed him in a close-security prison facility with a no-contact order that prevented visitation with his biological child, and violated his right to substantive and procedural due process as well as his rights under the Sixth Amendment. In Count II, Werlich sought a declaratory judgment that the predatory offender registration statute, Minn. Stat. § 243.166 (2020), is unconstitutional because the statute imposes punishment based on unproven allegations. And in Count III, Werlich sought a declaratory judgment that he meets the eligibility requirements for the Program under Minn. Stat. § 244.17 (2020).

The district court granted the Department's motion to dismiss Werlich's claims, except for his challenge to the prison visitation restriction, which was subsequently dismissed by the parties. The court of appeals affirmed the district court, finding that

Werlich is not eligible for admission to the Program and his constitutional claims lack merit.

The majority's analysis is largely untethered to the complaint. Rather than address just the claims alleged in the complaint, the majority contends that Werlich has additional claims for alleged violations of his right to parent, right to live with his child, right to travel, right to be free from unreasonable searches and seizures, right to free speech, and right to the presumption of innocence.

The majority affirms the dismissal of all of Werlich's claims, both those pleaded and those the majority imagines he pleaded, except for his claim of violation of his right to parent. The majority's analysis appears to find that some of the claims are not justiciable. Specifically, the majority concludes that an alleged violation of the Fourth Amendment is moot, an alleged violation of the right to travel is "without merit," and other alleged violations of Werlich's right to live with his biological child are hypothetical. Next, the majority appears to agree with the district court's decision to dismiss some of the claims, concluding that the registration statute is not punitive under the test announced in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). Specifically, the majority concludes that Werlich's exclusion from the Program is not punitive and the statute subjecting him to mandatory investigation based on his registered status is not punitive. Next, the majority appears to dismiss one claim based on Werlich's inability to show that he has a valid liberty interest in his participation in the Program. Finally, the majority dismisses the remaining claim, which the majority characterizes as alleging a violation of separation of powers principles, as a matter of law.

I agree with the majority that the predatory offender registration statute is not punitive for the reasons we explained in *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999). As a result, I would hold that the three claims alleged by Werlich in his complaint fail as a matter of law.[1]

In addition, to the extent that Werlich alleges a claim for violation of his right to parent that is separate from his dismissed prison-visitation-restriction claim, I would uphold the district court's dismissal of that claim because Werlich does not have standing to make it. Werlich alleged in his complaint that he is the biological father of a child. But the complaint states that Werlich is not married to the child's mother, and it does not allege a basis for any claimed physical or legal custodial rights.

In Minnesota, an assertion that one is the biological father of a child does not equate to custodial rights over the child. In fact, when the biological parents are not married at the time of the child's birth or conception, the mother is given "sole custody of the child until paternity has been established." Minn. Stat. § 257.541, subd. 1 (2020). Because the complaint does not allege that Werlich was married to the child's mother at the time of the birth or conception, or any other basis upon which paternity has been established, there is no basis upon which to presume, as the majority does, that Werlich has any parental rights at all. *See Heidbreder v. Carton*, 645 N.W.2d 355, 372–73 (Minn. 2002) (holding that

[1] In *Boutin,* we held that the consequences of registration did not result in a "loss of a recognizable interest" that could give rise to a liberty interest under procedural due process. 591 N.W.2d at 718–19 (applying the "stigma-plus" test of *Paul v. Davis*, 424 U.S. 693 (1976)). Although the statute has changed, the federal and state constitutions have not. *Boutin* still controls.

putative father was not entitled to due process protection of his interest in his putative child).[2] And because the complaint does not set forth a factual predicate for any physical or legal custodial rights, there is no basis on which to ground a due process claim for interference with a non-existent right to parent.

SooHoo v. Johnson, the only case on which the majority relies to find that Werlich's "right to parent" claim is viable, is not to the contrary. 731 N.W.2d 815 (Minn. 2007). *SooHoo* involved a challenge to the constitutionality of Minn. Stat. § 257C.08, subd. 4 (2006), which allowed a person who no longer lives with a child, but did for two or more years, to petition the district court for visitation rights. 731 N.W.2d at 818. The mother of the children in *SooHoo* argued that the statute would interfere with her right to parent her

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[2] The majority insists that Werlich has standing to assert a claim based on his right to parent because he has asserted sufficient facts in the complaint to establish a personal relationship with his child. Indeed, the majority claims that under *Lehr v. Robertson*, 463 U.S. 248 (1983), a person who has expressed "interest in personal contact with his child acquires substantial protection under the due process clause." *See supra* at 16 (citing *Lehr*, 463 U.S. at 261). However, the question presented in *Lehr* was whether "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty" and provides "a constitutional right to prior notice and an opportunity to be heard before he [is] deprived of that interest." 463 U.S. at 255. The United States Supreme Court observed that "[t]his court has examined the extent to which a natural father's biological relationship with his child receives protection under the Due Process Clause in precisely three cases" and went on to hold that a biological connection to a child, by itself, is not enough to provide constitutional protection for the future development of a parent-child relationship. *Id.* at 258, 261–62. Ultimately, the Supreme Court determined that the putative father's constitutional rights were not "offended" by the lack of notice given to him prior to the adoption of his biological child. *Id.* at 265. In *Heidbreder*, we applied the principle from *Lehr* that a biological connection is not enough to invoke due process protection. 645 N.W.2d at 372. I do not read *Lehr* or *Heidbreder* to suggest that a procedural due process claim can be premised on an individual's personal relationship with a child. As stated above, the relevant inquiry is whether an individual has established or alleged physical or legal custodial rights to a biological child. In this case, Werlich has not done so.

children if her former domestic partner was given visitation rights. *Id.* at 819–20. There was no question in *SooHoo* that the person claiming violation of the right to parent—the mother—had the right to parent. She adopted the children years earlier and they continued to reside with her, and we described her as the children's "custodial parent." 731 N.W.2d at 818, 823.

In this case, by contrast, there are no facts alleged in the complaint that establish or even suggest that Werlich has any physical or legal custodial rights to his biological child. Accordingly, I would hold that Werlich lacks standing to assert his "right to parent" claim. I would therefore affirm the decision of the court of appeals.

McKEIG, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Chief Justice Gildea.